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RECENT DEVELOPMENTS

LABOR LAW—DISTRICT COURT HAS LIMITED INJUNCTIVE POWERS TO ENFORCE INTER-UNION “NO-RAIDING” AGREEMENTS—*Local 1547, IBEW, AFL-CIO v. Teamsters Local 959*, 356 F. Supp. 636 (D. Alaska 1973).

The National Labor Relations Board (NLRB), exercising its statutory discretion to certify bargaining representatives,¹ generally refuses to recognize no-raiding agreements² between competing unions as a bar to a representation election.³ Its refusal is grounded in a concern

1. 29 U.S.C. § 159(c) (1970). After a petition for recognition is filed, a Board Examiner conducts an investigation to ascertain the following: (1) Whether the employer's operations affect commerce within the meaning of the NLRA; (2) the appropriateness of the unit of employees for collective bargaining purposes and the existence of a bona fide question concerning representation within the meaning of the Act; (3) whether the election would effectuate the policies of the Act and reflect the free choice of the employees in the unit; and (4) whether there is a sufficient probability that the employees have selected the union to represent them. 29 C.F.R. § 101.18 (1973).

If the Board finds there is reasonable cause to believe that a question of representation affecting commerce exists, it conducts a hearing. If it is clear a question of representation is presented, the Board directs an election and certifies the results. 29 U.S.C. § 159(c)(1) (1970).

2. A no-raiding agreement is a contract between two or more unions in which each waives its right to obtain bargaining rights in an employee unit in which another union holds certification from the NLRB or has been given an exclusive bargaining contract by the employer.

3. See, e.g., *The Texas Company*, 4 N.L.R.B. 182 (1937); *Los Angeles Period Furniture Co.*, 43 N.L.R.B. 327 (1942); *La Pointe Machine Tool Company*, 109 N.L.R.B. 514 (1954); *North American Aviation, Inc.*, 115 N.L.R.B. 1090 (1956); *F. C. Russell Company*, 116 N.L.R.B. 1015 (1956); *Minute Maid Corp.*, 117 N.L.R.B. 68 (1957); *The Borden Company*, 120 N.L.R.B. 1447 (1958); *The Steck Company*, 122 N.L.R.B. 12 (1958); *Penn-Keystone Realty Corp.*, 191 N.L.R.B. 800 (1971).

The Board's argument is twofold: Employee freedom of choice is a paramount value in national labor relations, and the statutory delegation of superior authority in representation matters to the Board cannot be compromised by an agreement between private parties. *Los Angeles Period Furniture Co.*, 43 N.L.R.B. 327, 329 (1942).

The Board has also refused, unless joined in the enforcement suit and so directed by court order, to allow a union, even under compulsion from its national, to withdraw its election petition where the motivation was observance of a no-raiding agreement. *Personal Products Corp.*, 122 N.L.R.B. 563 (1958); *Cadmium & Nickel Plating, Div. of Great Lakes Indus., Inc.*, 124 N.L.R.B. 353 (1959); *Cadmium & Nickel Plating, Div. of Great Lakes Indus., Inc.*, 124 N.L.R.B. 1386 (1959). The policy has been modified in cases involving AFL-CIO affiliates. See note 81 *infra*.

However, in its first formal declarations of policy, the Board deferred to the representation dispute adjustment mechanisms of AFL affiliates because the disputes could best be settled by the parties themselves. *Aluminum Co. of America*, 1 N.L.R.B. 530 (1936); *Axton-Fisher Tobacco Co.*, 1 N.L.R.B. 604 (1936); *Standard Oil Co. of Calif.*, 1 N.L.R.B. 614 (1936). Professor Aaron has remarked: "There seems little doubt that these pronouncements by the NLRB reflected not so much a deeply held conviction about the moral values of self government as a fear that the Board's somewhat precarious status would be fatally undermined if it became involved in union jurisdictional strife." Aaron, *Inter-Union Representation Disputes and the NLRB*, 36 TEX. L. REV. 846, 850 (1958).

that such agreements tend to compromise employee freedom of choice as well as the Board's statutory authority in representation matters. On the other hand, a no-raiding agreement is a contract, and Section 301 of the Labor Management Relations Act⁴ (LMRA) grants federal district courts jurisdiction to enforce inter-union contracts.⁵ A majority of federal courts has held that Section 301 applies to no-raiding agreements.⁶

For the most part, the courts have not had to resolve this conflict between Board policy of refusing to recognize no-raiding agreements and their own Section 301 jurisdiction to enforce inter-union contracts—either because the Section 301 action was commenced *before* a Board election order was issued⁷ or because the merits of the Section 301 claim were not reached, since the plaintiff was found not entitled to relief for other reasons.⁸ In a case commenced *after* the Board election order had issued, the court avoided the conflict by

4. Taft-Hartley Act, 29 U.S.C. §§ 141-97 (1970).

5. 29 U.S.C. § 185(a) (1970). Section 301 provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

6. Retail Clerks, Local Unions 128 & 633 v. Lion Dry Goods, Inc., 369 U.S. 17 (1962); United Textile Workers v. Textile Workers Union of America, 258 F.2d 743 (7th Cir. 1958); Local 33, Hod Carriers Union v. Mason Tenders Dist. Council of Greater New York, 291 F.2d 496 (2d Cir. 1961); NLRB v. Weyerhaeuser Co., 276 F.2d 865 (7th Cir. 1960), *cert. denied*, 364 U.S. 879 (1960); International Bhd. of Firemen and Oilers v. International Ass'n of Machinists, 338 F.2d 176 (5th Cir. 1964); Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1970); Local 2608, Lumber and Sawmill Workers v. Millmen's Local 1495, 169 F. Supp. 765 (N.D. Cal. 1958); Brick and Clay Workers v. Dist. 50, 345 F. Supp. 495 (E.D. Mo. 1972). *Contra*, International Union of Doll & Toy Workers v. Metal Polishers Int'l Union, 180 F. Supp. 280 (S.D. Cal. 1960).

7. In *United Textile Workers v. Textile Workers Union of America*, 258 F.2d 743 (7th Cir. 1958), for example, the Seventh Circuit upheld a district court order, issued before the Board ordered an election, enforcing an arbitration award made pursuant to a no-raiding agreement and requiring the raiding party to withdraw its petition for certification. Unfortunately, the Board was not permitted to intervene at the appellate level and its amicus brief was rejected by the court, which then decided the issue of contract enforceability without reference to possible conflict between § 301 and the Board's representation authority under § 9. In *International Bhd. of Firemen and Oilers v. International Ass'n of Machinists*, 338 F.2d 176 (5th Cir. 1964), the Court of Appeals upheld a district court's enforcement of an arbitration award under a no-raiding agreement which required the raiding union to cease its solicitation activities. The court cautioned that any subsequent conflicting Board decision in response to a charge of unfair labor practice would control.

8. See *Local 2608, Lumber & Sawmill Workers v. Millmen's Local 1495*, 169 F. Supp. 765 (N.D. Cal. 1958) (relief denied after the election was held because of union's failure to seek redress within the union framework); *NLRB v. Weyerhaeuser*

holding that a no-raiding agreement was not the sort of "contract" contemplated by Section 301.⁹

The Alaska District Court recently confronted this conflict in *IBEW v. Teamsters*.¹⁰ The IBEW was the certified collective bargaining agent of an employee unit, and had signed a no-raiding agreement with the Teamsters.¹¹ In violation of the agreement, Teamsters representatives solicited authorization cards from employees already represented by the IBEW, and, upon obtaining the required number of cards, filed a petition for certification as bargaining agent with the Board. At the hearing before the Board to determine whether to conduct an election, the IBEW asserted the no-raiding agreement as a bar to the Teamster's petition. The Board ordered an election in spite of the agreement. While the balloting was being conducted, the IBEW

Co., 276 F.2d 865 (7th Cir. 1960), *cert. denied*, 364 U.S. 879 (1960) (employer's defense to unfair labor practice charge, that the election procedure was improper because the certified union had violated a no-raiding agreement, held invalid because union had disaffiliated from the AFL-CIO and was probably no longer bound by the agreement); *Local 33, Hod Carriers Union v. Mason Tenders Dist. Council of Greater New York*, 291 F.2d 496 (2d Cir. 1961) (work assignment agreement held enforceable under § 301, but relief denied because plaintiff had failed to exhaust contractual remedies within the union framework); *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1970) (no-raiding issue left expressly undecided because plaintiffs, as former employees, lacked standing to enforce the agreement); *Brick and Clay Workers v. District 50*, 345 F. Supp. 495 (E.D. Mo. 1972) (no injunction against activities of raiding union because in absence of inter-union agreement to mandatory arbitration of a raiding dispute, injunction would contravene anti-injunction provisions of the Norris-LaGuardia Act).

9. *International Union of Doll & Toy Workers v. Metal Polishers Int'l Union*, 180 F. Supp. 280 (S.D. Cal. 1960).

10. *Local 1547, IBEW v. Local 959, Teamsters Union*, 356 F. Supp. 636 (D. Alaska 1973) (hereinafter cited *IBEW v. Teamsters*). This decision and a second decision denying damages, 83 L.R.R.M. 2785 (1973), are before the Ninth Circuit Court of Appeals. *Appeals docketed*, No. 73-1644, 9th Cir., April 10, 1973 & No. 73-2647, 9th Cir., Aug. 15, 1973.

11. The no-raiding agreement between the IBEW and Teamsters, at issue in the instant case, states in pertinent part:

1. Each union agrees to refrain from organizing or representing employees in any situation where an established collective bargaining relationship exists involving the other union. For the purpose of this provision, the term "established collective bargaining relationship" means any situation in which either union (a) has been recognized by the employer as the collective bargaining representative of the employees involved, or (b) has been certified by the National Labor Relations Board or other federal, state or provincial agency as the collective bargaining agent of the employees.

....

3. If any dispute over the implementation of this agreement shall arise at the local union level, settlement shall first be sought between the District Vice President of the IBEW and the Area Conference Director of the IBT [Teamsters]. Upon their failure to reach agreement, the dispute shall be settled by the International Presidents of both unions or their designated representatives.

IBEW v. Teamsters, 356 F. Supp. at 638.

brought an action in federal district court under Section 301 of the LMRA for specific performance of the no-raiding agreement. On motions for summary judgment and dismissal, the court held that although a federal district court has no power under Section 301 to enforce a no-raiding agreement after the NLRB has ordered an election, it does have general jurisdiction to review the validity of the Board's action in ordering the election; if the election order is invalid, the no-raiding agreement then can be enforced.

The court found the Board's election order invalid. The court observed that if the two unions contesting the right to represent the collective bargaining unit had been rival AFL-CIO unions bound by the AFL-CIO no-raiding agreement,¹² the Board would have pursued its special AFL-CIO no-raiding agreement policy and refrained from ordering an election until the parties had exhausted use of the dispute adjustment mechanism provided by that agreement.¹³ The court held it might find, after hearing full arguments, that the Board's observance of this special policy for only AFL-CIO agreements was a discriminatory policy constituting an abuse of the Board's discretion. Such a conclusion would render the Board's election order invalid and subject to injunction, permitting enforcement of the no-raiding agreement. Therefore, motions by the defendant and intervenor NLRB for summary judgment and dismissal were denied. On defendant's subsequent motion to reconsider, however, the court decided that the plaintiff's failure to exhaust its administrative remedies by appealing the regional director's election order to the full Board served as a bar to the court's exercise of equitable jurisdiction.¹⁴

The opinion is confusing, unfortunately, because it resolves issues not presented by the facts, and because the court was grossly in error both in finding that the no-raiding agreement contained a mandatory

12. The AFL-CIO Internal Disputes Plan [hereinafter referred to as the AFL-CIO no-raiding agreement] is incorporated at Art. 20 into the AFL-CIO Constitution. The present agreement binds *all* AFL-CIO affiliates. It prohibits raids between affiliates, prohibits use of court proceedings in disputes under the agreement, and provides for mediation and arbitration of disputes under the agreement. Its practical workings are described in Cole, *Review of Operation of AFL-CIO Internal Disputes Plan*, in 1969 BNA LAB. REL. YEARBOOK 407. For a discussion of developments leading to the adoption of Art. 20, see A. GOLDBERG, *AFL-CIO: LABOR UNITED* 76-79 (1956); Aaron, *Inter-union Representation Disputes and the NLRB*, 36 TEX. L. REV. 846, 853-56 (1958); Cole, *Jurisdictional Issues and the Promise of Merger*, 9 IND. & LAB. REL. REV. 391 (1956); Lehrer, *the CIO Jurisdictional Dispute Experience*, 11 IND. & LAB. REL. REV. 247 (1958).

13. NLRB FIELD MANUAL § 11050 (1971). See note 81 *infra*.

14. 356 F. Supp. at 643. This note does not discuss the exhaustion issue.

arbitration clause¹⁵ (it did not¹⁶) and in concluding that *Leedom v. Kyne*¹⁷ might permit injunction of Board action which did not contravene an *express* prohibition of the labor statutes.¹⁸

Despite the court's inadequate handling of the fact pattern peculiar to this case, the opinion discussed and attempted to resolve issues of great general significance relating to the proper tribunal—the courts or the Board—to enforce a no-raiding agreement: (1) Does Section 301 of the LMRA grant federal district courts jurisdiction to specifically enforce a no-raiding agreement after the raiding union has invoked the Board's election processes? (2) If so, may the courts specifically enforce the agreement by (a) enjoining the raiding union's solicitation activities; (b) enjoining the Board's processing of the raiding union's petition for certification of the election; and (c) ordering the raiding union to withdraw its petition? (3) If the court lacks jurisdiction or for policy reasons should not exercise jurisdiction to specifically enforce the agreement, what relief should be granted?

This note concludes that a federal district court does possess jurisdiction under Section 301 of the LMRA to specifically enforce a no-raiding agreement even after the raiding union has filed a petition for certification of an election with the Board. The court's jurisdiction is severely restricted, however, by provisions of national labor relations statutes which prohibit federal district courts from entertaining actions to enjoin a raiding union's solicitation activities or to enjoin the Board's processing of the raiding union's petition for certification of the election. The court wholly lacks jurisdiction to enjoin solicitation by the raiding union, whether the injunction is requested in an action to enforce an arbitral award or in a Section 301 suit in the first instance, because such injunctions are prohibited by the Norris-LaGuardia Act. Injunctions against the Board's processing of the raiding union's petition for certification, seeking to prevent holding of the election or certification of the winning union, also are prohibited by the review provisions of the NLRA. While the federal district courts do possess jurisdiction to order the raiding union to withdraw its petition, as a matter of policy the courts should deny this

15. 356 F. Supp. at 640.

16. The agreement provided only for negotiations between successively higher officials of the unions. See note 11 *supra*.

17. 358 U.S. 184 (1958).

18. See text at notes 76–83 *supra*.

relief. Rather, they should limit relief to specific enforcement of an agreement to arbitrate the raiding dispute and to damages for breach of the no-raiding agreement. This policy would preserve a balance between the two conflicting key policies of the national labor relations statutes—employee freedom of choice in electing bargaining representatives and industrial peace.

I. JURISDICTION TO ENFORCE A NO-RAIDING AGREEMENT

The court in *IBEW v. Teamsters* concluded that a district court lacks jurisdiction in a Section 301 action to enforce a no-raiding agreement where the NLRB already has ordered an election. The court based its conclusion on two established principles of labor law—that the Board's powers cannot be limited by private agreement, and that Congress intended to restrict the role of the federal courts in disputes arising from employee representation contests. However, study of the legislative history of Section 301, of the pattern of the labor statutes considered as a whole and of a U.S. Supreme Court precedent in an analogous case neither compels nor forecloses the result reached by the court. Because of this ambivalence, these sources cannot be relied upon as authority for withdrawing the jurisdiction which Section 301 on its face plainly vests in the federal courts—jurisdiction over “suits for violation of contracts . . . between . . . labor organizations.”¹⁹

Section 9 of the National Labor Relations Act (NLRA)²⁰ describes the Board's representation functions. Although Section 301 of the LMRA granting the federal district courts jurisdiction over actions to enforce contracts between labor organizations is a later enactment, no legislative history explains the types of contracts Congress had in mind when it adopted Section 301,²¹ nor is there any indication that

19. 29 U.S.C. § 185(a) (1970).

20. 29 U.S.C. § 159 (1970).

21. The major purpose of § 301 was to facilitate suit against labor organizations by waiving the amount in controversy requirement, H.R. REP. NO. 245, 80th Cong., 1st Sess. 46 (1947), and by providing jurisdiction without service on every individual member, H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. (1947). Although the language “between such labor organizations” was added by the Conference Committee.

Section 301 was intended to repeal, sub silentio, any part of Section 9 of the NLRA.²² One court²³ has concluded that Section 301 was intended merely to plug a gap in the NLRA's regulation of the employer-employee relationship beyond the reach of the Board's jurisdiction over unfair labor practice charges, a gap created by the Board's inability to enforce collective bargaining agreements. Since no similar gap exists under the NLRA in the Board's jurisdiction over employee representation, court jurisdiction over questions of representation was unnecessary, and therefore, the court concluded, Section 301 does not apply to no-raiding agreements. The language in Section 301 providing for jurisdiction over contracts between unions may refer to inter-union agreements other than no-raiding agreements, such as work assignment agreements²⁴ or perhaps to union-local constitutions.²⁵ But lack of meaningful legislative history makes speculation about Congress's intent futile.

An examination of the labor statutes as a whole is similarly unhelpful in determining whether Section 301 of the LMRA limits the Board's powers under Section 9 of the NLRA. Section 9²⁶ requires the Board to order an election for bargaining representatives when it receives a petition for certification and after investigation finds reason-

there is no indication in the Conference Report or the postconference debates of the purpose of this addition. 2 NLRB LEGISLATIVE HISTORY OF THE LMRA 1543 (1948). No-raiding agreements were in effect, however, long before § 301 was adopted. *See, e.g.*, the agreement of October 26, 1935, between Oil Workers, AFL, and International Association of Machinists, AFL, in which the Oil Workers agreed not to accept or retain in their membership employees over whom the IAM had been granted jurisdiction by their common parent, the AFL. 4 N.L.R.B. 182 (1937). The Board in *Los Angeles Period Furniture Co.*, 43 NLRB 327, 329 (1942), refers to an agreement between the AFL and CIO that neither would conduct campaigns or ask for elections in plants which the other had under contract. *See generally* Jaffe, *Inter-Union Disputes in Search of a Forum*, 49 YALE L.J. 424, 432-43 (1940); Comment, *The Influence of the National Labor Relations Board upon Inter-Union Conflicts*, 38 COLUM. L. REV. 1243, 1243-46 (1938).

22. "The cardinal rule is that repeals by implication are not favored." *Posadas v. National City Bank*, 296 U.S. 497 (1936).

23. *International Union of Doll & Toy Workers v. Metal Polishers Int'l Union*, 180 F. Supp. 280 (S.D. Cal. 1960).

24. *Local 33, Hod Carriers Union v. Mason Tenders Dist. Council of Greater New York*, 291 F.2d 496 (2d Cir. 1961).

25. *Parks v. IBEW*, 314 F.2d 886 (4th Cir. 1963), *cert. denied*, 372 U.S. 976 (1963).

26. 29 U.S.C. § 159 (1970).

able cause to believe that a question of representation exists.²⁷ The Act does not specify the factors which the Board should consider in determining whether a question of representation exists, but impliedly leaves formulation of those factors to the Board's discretion. It is in the exercise of this Section 9 discretion that the Board has developed its policies toward no-raiding agreements.

Both acts in some respects appear more solicitous of the Board's unfair labor practice prerogatives than of its representation functions. For example, Section 303 of the LMRA,²⁸ which provides a civil cause of action for persons injured by certain union secondary activity, limits the plaintiff's remedy to damages in order not to interfere with the Board's remedial powers under the statute's unfair labor practice provisions.²⁹ By contrast, Section 301 provides no comparable protection for the Board's representation functions. Similarly, Section 10(a) of the NLRA³⁰ protects the Board's powers in unfair labor practice cases from limitation by "any other means of adjustment or prevention that has been or may be established by agreement,

27. 29 U.S.C. § 159(c)(1) (1970) provides:

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) [By an employee or group of employees]

(B) [By an employer]

The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

28. 29 U.S.C. § 187 (1970) states:

...

(b) Whoever shall be injured in his business or property by reason of any violation of . . . [§ 8(b)(4)] may sue therefor in any district court of the United States subject to the limitations and provisions of Section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29. An injunction in a § 303 suit would interfere with the Board's power to enjoin a union from engaging in the unfair labor practice. Under § 10 of the NLRA the Board is directed to petition the court for appropriate injunctive relief if an investigation reveals there is reasonable cause to believe that a charge of violation of subsections (A), (B) or (C) of § 8(b)(4) of the NLRA is true.

30. 29 U.S.C. § 160(a) (1970) provides:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

law or otherwise," but again the Act supplies no equivalent protection for the Board's representation function.³¹ The presence of express statutory provisions protecting the Board's powers in unfair labor practice functions and the absence of such provisions in representation functions suggests that Congress perhaps did not intend the labor statutes to prohibit limitation of the Board's representation functions by private agreement or by specific enforcement of that agreement in the courts.

On the other hand, Sections 9 and 10 of the NLRA, which provide for review of Board representation proceeding orders by courts of appeals, have been interpreted to allow review of representation orders only in conjunction with a court of appeals enforcement of a Board order terminating an unfair labor practice.³² District courts, under this interpretation, could never review representation proceeding orders. The court in *IBEW v. Teamsters* concluded that a suit to enforce a no-raiding agreement after an election order has issued

31. Professor Meltzer notes as follows:

An *inclusio unius* argument, in this complex context, would, however, be a barren exercise in word chopping. No reason appears for granting the Board plenary power to override arbitration and judicial decrees impinging on unfair labor practices while denying such power in the representation context. On the contrary, representation matters would appear to present an especially appealing case for recognizing the Board's plenary power.

Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: Part II*, 59 COLUM. L. REV. 269, 299 (1959).

32. NLRA § 9(d), 29 U.S.C. § 159(d) (1970), provides:

Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court . . . shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript. Section 10(f) authorizes "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought" to obtain a review of the order in the Court of Appeals. The U.S. Supreme Court in *AFL v. NLRB*, 308 U.S. 401 (1940), held that "final order" referred only to orders issued in unfair labor practice proceedings and did not include certification orders.

Congress consistently has rejected proposals which would give a right to direct review of certification orders. See S. REP. NO. 573, 74th Cong., 1st Sess. 506 (1935); H.R. REP. NO. 1147, 74th Cong., 1st Sess. 7 (1935); *Hearings Before The Senate Comm. on Education and Labor on S. 1000*, 76th Cong., 1st Sess. 460-63, 584-85; H.R. REP. NO. 245, 80th Cong., 1st Sess. 43, 59-60 (1947) (indicating the House version of the Taft-Hartley amendments called for direct review of certification orders by the courts of appeals); H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 56-57 (1947) (deleting the review provision); 93 CONG. REC. 6444 (1947) (remarks of Senator Taft that the review provision would permit dilatory tactics).

seeks, in effect, "review" of that order; since Sections 9 and 10 of the NLRA preclude review of representation orders by district courts, the court held that it lacked jurisdiction over the suit. This argument probably exaggerates the inclusiveness of the NLRA's restrictions on review. Those restrictions appear in an earlier statute and were designed to prevent inevitable delays in certification which would have resulted if reluctant employers could have contested the validity of representation orders at every step of the election process.³³ While a plaintiff union in a Section 301 action also seeks delay by an injunction requiring the raiding party to withdraw its petition, the plaintiff nevertheless is asserting rights granted by a later statute.

Nor, finally, does the one Supreme Court decision on point compel the conclusion that a federal court lacks jurisdiction to enforce a no-raiding agreement. The court in *IBEW v. Teamsters* properly rejected the Board's reliance on *Carey v. Westinghouse*³⁴ for the proposition that Board authority is superior to that of the courts in representation matters.³⁵ *Carey* involved a suit to compel arbitration of a juris-

33. *AFL v. NLRB*, 308 U.S. 401, 409-11 (1940).

34. 375 U.S. 261 (1964).

35. The principle that Board jurisdiction cannot be limited by private contract is applied by the Board and courts to certain representation issues in which its observance is not mandated by § 10(a) of the NLRA. For example, where the collective bargaining agreement contains a clause including employees at all future installations within the bargaining unit, the Board will give effect to that agreement only if it determines that each new group of employees represents an accretion to the existing unit; when the Board decides that the new employees do not constitute an accretion, it orders an election in the unit. *Melbet Jewelry Co.*, 180 N.L.R.B. 107, 109-110 (1969). The courts have held that no contract right of the parties can limit the Board's discretion under § 9(b) of the NLRA in determining bargaining units. *See Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352, 1357 (9th Cir. 1970), and cases cited therein; *NLRB v. Horn & Hardart Co.*, 439 F.2d 674 (2d Cir. 1971). Similarly, where the Board has already issued a unit clarification order, the court will not under § 301 compel arbitration over the precise issue of correctness of the bargaining unit. *Smith Steel Workers v. A.O. Smith Corp.*, 420 F.2d 1 (7th Cir. 1969); *International Brotherhood of Teamsters v. Ace Enterprises, Inc.*, 332 F. Supp. 36 (S.D. Cal. 1971).

And a collective bargaining agreement is unenforceable where the Board has determined the union is no longer the bargaining representative. *Retail Clerks v. Montgomery Ward*, 316 F.2d 754 (7th Cir. 1963). An arbitrator's award requiring the employee to negotiate with a union is similarly unenforceable where the Board has determined the union is no longer the bargaining representative. *Glendale Mfg. Co. v. Local 520, ILGWU*, 283 F.2d 936 (4th Cir. 1960), *cert. denied*, 366 U.S. 950 (1961).

See also *NLRB v. Deutsch Company*, 265 F.2d 473, 482 (9th Cir. 1959), *cert. denied*, 361 U.S. 963 (1960), *reh. denied*, 362 U.S. 945 (1960) (union by participating in a private election did not waive its right to represent the employees under the Board's certification because the Board cannot be bound by agreements between the parties); *NLRB v. Hood Corp.*, 346 F.2d 1020 (9th Cir. 1965) (consent election agreement between parties settling question of voter eligibility will be honored by NLRB only if certain requests are met); *cf. J. I. Case v. NLRB*, 321 U.S. 332 (1944).

dictional dispute which could have been viewed either as a work assignment contest (for which the NLRA provides relief only if one union strikes) or a bargaining unit determination (remediable in response to a Section 8(a)(5) unfair labor practice charge or by a petition for unit clarification under Section 9 of the NLRA). Recognizing that the dispute was potentially cognizable before the Board, the *Carey* court nevertheless upheld the lower court's jurisdiction to order arbitration of the dispute. The court recognized the ultimate primacy of the Board in determining bargaining units, however, and concluded, in dicta:³⁶

Should the Board disagree with the arbiter by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301 . . . the superior authority of the Board may be invoked at any time.

This dictum should not be read too broadly. Where the breach of the collective bargaining agreement which the plaintiff seeks to have arbitrated or litigated turns on the proper definition of the bargaining unit, as in *Carey*, a contrary Board ruling in a subsequent unfair labor practice case or on a petition for unit clarification necessarily undercuts the court's or arbitrator's earlier ruling. By contrast, in the no-raiding situation the Board's competence is directed only at deciding whether a question of representation exists; the court or arbitrator determines the existence of a breach of the agreement. Under Section 301, therefore, the courts possess a unique competence to which the Board's authority could not be "superior."

Thus, neither the legislative history of Section 301, nor the national labor relations statutes when considered as whole, nor *Carey* clearly denies a district court jurisdiction under Section 301 to enforce a no-raiding agreement after the Board has ordered an election. Therefore, the general jurisdiction conferred upon federal district courts by Section 301 to enforce inter-union contracts should be held to comprehend no-raiding agreements. This general grant of jurisdiction is severely restricted, however, by the specific anti-injunction provisions of the Norris-LaGuardia Act, the specific review provisions of the

36. 375 U.S. at 272.

NLRA and factors which urge a policy choice that no-raiding agreements be enforced in only a limited manner.

A. Jurisdiction to Enjoin the Raiding Union's Solicitation Activities

The court in *IBEW v. Teamsters* assumed incorrectly that the no-raiding agreement between plaintiff and defendant contained a mandatory arbitration clause and that therefore, under the *Boys Markets* exception,³⁷ the anti-injunction provisions of the Norris-LaGuardia Act³⁸ would not bar the court's exercise of jurisdiction over an action to specifically enforce the no-raiding agreement. It held that the court lacked jurisdiction, however, because the Board had ordered an election.

Section 4 of Norris-LaGuardia withdraws from the federal courts jurisdiction to enjoin certain specific, enumerated acts, such as joining a union, giving publicity to a labor dispute and agreeing with others to do these acts.³⁹ Read literally, then, subsections 4(b) and (e) of the Norris-LaGuardia Act absolutely preclude an injunction against the defendant union's solicitation activities because such an injunction would inhibit employees from becoming members of that union and would prevent the union from presenting to the employees the facts involved in the labor dispute, facts needed by the employees if they are to determine which union could best represent them.⁴⁰ Furthermore,

37. *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

38. 29 U.S.C. §§ 101-15 (1970).

39. 29 U.S.C. § 104 (1970). This section provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

....
(b) Becoming or remaining a member of any labor organization or of any employer organization

(c) Paying or giving to, or withholding, from any person participating or interested in such labor dispute ... other moneys or things of value;

....
(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute

40. The court in *Brick & Clay Workers v. District 50*, 345 F. Supp. 495 (E.D. Mo. 1972), refused to enforce a no-raiding agreement because of the prohibition in

Section 7⁴¹ of the same act denies the courts jurisdiction to issue injunctions in any case involving or growing out of a "labor dispute"⁴² unless certain unlawful activities are in progress, and then only if the court adheres to strict procedural requirements.⁴³ That inter-union rivalry for members is a labor dispute within the meaning of the statute was clearly established by a majority of cases involving recognitional picketing⁴⁴ decided prior to enactment of the Taft-Hartley amendments which explicitly made such activity an unfair labor practice under Section 8(b)(4).⁴⁵

§ 4(b) against enjoining an employee from "becoming or remaining a member of any labor organization."

41. 29 U.S.C. § 107 (1970).

42. A "labor dispute" is defined as:

[A]ny controversy concerning terms or conditions of employment, or concerning the association or representation of person in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c) (1970). A case involves or grows out of a labor dispute:

[W]hen the case involves persons . . . who are members of the same or an affiliated organization of employers or employees; whether such dispute is . . . (3) between one or more employees or associations of employees and one or more employees or associations of employees

29 U.S.C. § 113(a) (1970).

43. The requirements include a hearing in open court to establish that unlawful acts have been threatened and will be committed or continued, that substantial and irreparable injury to the complainant's property will follow, that greater harm will result to complainant by denial of relief than to defendants by granting of relief, that complainant has no adequate remedy at law, and that the peace officers are unable or unwilling to furnish adequate protection. 29 U.S.C. § 107 (1970).

44. See, e.g., *Green v. Obergfell*, 121 F.2d 46 (D.C. Cir. 1941) *cert. denied*, 314 U.S. 634 (1941) (action by Brewery Workers Union against Teamsters Union and parent labor organization to enjoin the transfer of wagon drivers to Teamsters Union was held a "labor dispute" where the essence of the dispute was conflicting claims by the two unions to organize the drivers); *Yoerg Brewing Co. v. Brennan*, 59 F. Supp. 625 (D. Minn. 1945) (dispute between industrial union and craft union over representation of bargaining unit was labor dispute); *Teamsters Union v. International Union of Brewery Workers*, 106 F.2d 871 (9th Cir. 1939) (action by incumbent union after incumbent won election against challenging union to restrain the challenger from picketing and to compel its submission of the dispute to a settlement procedure to which both unions were contractually bound held a labor dispute); *United Electric Coal Companies v. Rice*, 80 F.2d 1 (7th Cir. 1935); *Fur Workers Union, Local 72 v. Fur Workers Union*, 105 F.2d 1 (D.C. Cir. 1939), *aff'd per curiam*, 308 U.S. 522 (1939); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938). *Contra*, *Oberman & Co. v. United Garment Workers*, 21 F. Supp. 20 (W.D. Mo. 1937); *Union Premier Food Stores v. Retail Food Clerks Union*, 98 F.2d 821 (3d Cir. 1938). See also cases collected in *Loeb, Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 11 LAB. L.J. 473 (1960); 50 HARV. L. REV. 1295 (1937). The attempt to unionize has also been held to constitute a labor dispute. *Texas Millinery Co. v. United Hatters Int'l Union*, 229 F. Supp. 341 (N.D. Tex. 1964).

45. 29 U.S.C. § 158(b)(4) (1970).

Despite this apparently blanket prohibition of injunctions against solicitation, the Alaska federal court held that the Norris-LaGuardia Act did not apply in *IBEW v. Teamsters*. The court relied upon the fact that although the courts generally have construed the Act broadly,⁴⁶ it has not been held applicable to all situations to which, on its face, it might seem applicable.⁴⁷ Even though the legislative history of Section 301 indicates that Congress did not intend to repeal sub silentio the application of Norris-LaGuardia to suits for breach of contract,⁴⁸ the Act's anti-injunction provisions have been disregarded where enforcement of a contract under Section 301 was sought. Courts have reasoned that injunctions in these instances would not amount to one of the abuses enumerated in Section 4 of Norris-LaGuardia against which the Act was directed.⁴⁹ Thus, despite the apparently absolute prohibition of Section 4, courts have issued injunctions to compel arbitration,⁵⁰ to prevent breach of a parent-local agreement embodied in a union constitution,⁵¹ to enforce an arbitration award made pursuant to arbitration procedures of a collective

46. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365 (1960); *Port of Houston Authority v. International Organization of Masters, Mates and Pilots*, 456 F.2d 50 (5th Cir. 1972); *Electrical Contractors Ass'n of Greater Boston, Inc. v. Local Union 103, IBEW*, 327 F. Supp. 1177 (D. Mass. 1971). See also 72 HARV. L. REV. 354 (1958).

47. For a discussion of the conflict between the Norris-LaGuardia Act and later labor statutes, see Aaron, *The Labor Injunction Reappraised*, 14 LAB. L.J. 41 (1963); Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 1027 (1963); Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591 (1954); Stewart, *No-Strike Clauses in the Federal Courts*, 59 MICH. L. REV. 673 (1961); Wimberly, *The Labor Injunction—Past, Present, and Future*, 22 S.C. L. REV. 689 (1970); Comment, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70 (1960); Comment, *Jurisdiction of Federal Courts to Enjoin Labor Disputes*, 32 TENN. L. REV. 264 (1965).

48. The House bill explicitly authorized the issuance of injunctions to private parties and repealed the Norris-LaGuardia Act in suits to enforce employer-union contracts. H.R. 3020, 80th Cong., 1st Sess. § 302(e) (1947). See also H.R. REP. NO. 245, 80th Cong., 1st Sess. 46 (1947). This provision was deleted in Conference Committee. H.R. CONF. REP. NO. 510 80th Cong., 1st Sess. 66 (1947). The Conference Report also states that after the Conference Committee amendment to § 301(e), only § 6 of the Norris-LaGuardia Act would be of no effect. Floor debate indicates that Congress believed Norris-LaGuardia remained in effect unless expressly repealed by the Taft-Hartley amendments. 2 NLRB LEGISLATIVE HISTORY OF THE LMRA at 1365, 1396 (1948) (remarks of Senator Taft). See also *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962).

49. *United Textile Workers v. Textile Workers Union of America*, 258 F.2d 743 (7th Cir. 1958).

50. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

51. *Parks v. IBEW*, 314 F.2d 886 (4th Cir. 1963), cert. denied, 372 U.S. 976 (1963).

bargaining agreement,⁵² and—in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*⁵³—to enjoin a strike in breach of a no-strike clause appearing in conjunction with a mandatory grievance arbitration clause in the collective bargaining agreement. It is on this *Boys Markets* exception to Section 4 that the court relied in *IBEW v. Teamsters*, finding an equivalence between a no-strike and a no-raiding agreement.

The *Boys Markets* exception to the Norris-LaGuardia Act is a narrow one,⁵⁴ however, and applies only where four conditions are present: (1) The collective bargaining agreement contains a mandatory adjustment or arbitration procedure; (2) the strike is over a grievance which both parties are contractually bound to arbitrate; (3) the traditional requirements of equity are met; and (4) the court first orders the employer to arbitrate. The Court in *Boys Markets* reasoned that if these requirements were met, an injunction which merely enforced the terms of an agreement freely entered into between employer and union would not frustrate the core purpose of the Act and actually would advance two major policies in labor relations—the peaceful resolution of disputes through arbitration and the promotion of freedom to contract. Whether this argument is equally valid with respect to a no-raiding agreement which contains a mandatory arbitration clause is questionable.

An argument can be made that the Act's prohibition should not apply in the no-raiding context. Although the Norris-LaGuardia Act

52. *Pacific Maritime Ass'n v. International Longshoremen's Union*, 454 F.2d 262 (9th Cir. 1971); *Electrical Contractors Ass'n of Greater Boston, Inc. v. Local Union 103, IBEW*, 327 F. Supp. 1177 (D. Mass. 1971); *General Dynamics v. Local 5, Independent Union of Marine Workers*, 469 F.2d 848 (1st Cir. 1972); *Dairy Employees Union, Local 98 v. Gillespie Milk Products Corp.*, 203 F.2d 650 (6th Cir. 1953).

53. 398 U.S. 235 (1970).

54. The lower federal courts generally have restricted injunctive relief to the *Boys Markets* factual situation. See, e.g., *Martin Hageland, Inc. v. United States District Court*, 460 F.2d 789 (9th Cir. 1972); *Amstar Corp. v. Amalgamated Meat Cutters of N. Am.*, 468 F.2d 1372 (5th Cir. 1972); *Parade Publications, Inc. v. Philadelphia Mailers Union 14*, 459 F.2d 369 (3d Cir. 1972); *Morning Telegraph v. Powers*, 450 F.2d 97 (2d Cir. 1971); *New York Telephone Co. v. Communications Workers of Am.*, 445 F.2d 39 (2d Cir. 1971); *Old Ben Coal Corp. v. Local Union 1987, UMW*, 457 F.2d 162 (7th Cir. 1972).

Where the union has expressly reserved its right to strike over certain grievances, no injunction was issued. *Standard Food Products Corp. v. Brandenburg*, 436 F.2d 964 (2d Cir. 1970).

For cases expanding the *Boys Markets* guidelines, see Relias, *The Developing Law Under Boys Markets*, 23 LAB. L.J. 758 (1972); Gentile, *Injunctive Relief: An Old Remedy Rejuvenated*, 25 N.Y.U. CONF. LAB. 143 (1973).

relegated the federal courts to the role of neutral arbitrator,⁵⁵ Congress, by subsequently adopting Section 301, reintroduced active labor legislating by the federal courts.⁵⁶ Second, there is a suggestion in the legislative history of Norris-LaGuardia that the purpose of including inter-union conflicts within the Act's definition of "labor disputes"⁵⁷ was to prohibit injunctions instituted by management on behalf of a company union.⁵⁸ An injunction against solicitation as a means to enforce a contract between two legitimate unions does not involve such management interference. Third, the procedural requirements of Section 7 indicate⁵⁹ that the Act was intended to protect one party from the other's coercive acts, not to permit it to commit acts from which the parties have by contract agreed to abstain. Finally, the policy stated in Section 2, that of guaranteeing an employee freedom from coercion by *employers* in designating bargaining representatives of his own choosing, does not necessarily require freedom from coercion by fellow *employees*.⁶⁰

55. Congress repudiated the federal common law of labor relations under which federal courts had formulated labor policy through injunction. *See generally* F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930); E. WITTE, *THE GOVERNMENT IN LABOR DISPUTES* (1932); Christ, *The Federal Anti-Injunction Bill*, 26 *ILL. L. REV.* 516 (1932); Witte, *The Federal Anti-Injunction Act*, 16 *MINN. L. REV.* 638 (1932).

56. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957); *cf. id.* at 460 (Frankfurter, J., dissenting).

57. 29 U.S.C. § 113(c) (1970).

58. The purpose of § 13 was to define labor dispute broadly enough to include others than the immediate disputants and thereby correct the law announced in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), and *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). H.R. REP. NO. 669, 72d Cong., 1st Sess. 10-11 (1932); S. REP. NO. 163, 72d Cong., 1st Sess. (1932). *See also* 75 CONG. REC. 5463 (1932) (remarks of Rep. O'Connor); 75 CONG. REC. 4916, 5483, 5489 (1932). That Congress was aware of the problem of company unions obtaining injunctions against soliciting unions when it drafted § 13 in an earlier bill, S. 1482, 70th Cong., 2d Sess. (1928), is indicated by the testimony of William Green on the bill. *Hearings on S. 1482 Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 2d Sess., pt. 1, 36 *et seq.* (1928).

59. *See* note 42 *supra*.

60. Norris-LaGuardia Act § 2, 29 U.S.C. § 102 (1970). Section 2 states in part (emphasis added):

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives

Whatever the logical merits of these arguments, however, the *Boys Markets* Court expressly reaffirmed the continued vitality of the Norris-LaGuardia Act. An injunction against solicitation activities to enforce a no-raiding agreement would be justified only by reasons as compelling as those justifying an injunction against the striking union in *Boys Markets*. A comparison suggests a less compelling case exists in the no-raiding situation. First, a no-strike clause furthers more vital labor policy goals than does a no-raiding agreement. In the *Boys Markets* situation a no-strike clause is the union's quid pro quo for management's agreement to arbitrate grievances; if the no-strike clause cannot be enforced, management loses its incentive to agree to arbitration, resulting in the ultimate frustration of two major goals in labor relations—the peaceful resolution of disputes through arbitration and the advancement of employee equality of bargaining power. By contrast, the no-raiding agreement promotes only industrial peace, and it does so only by sacrificing employee freedom of choice. Second, in the *Boys Markets* context the stakes are higher. A strike has greater impact on the flow of commerce and on the interests of the general public, as well as on the parties directly involved, than does raiding. Preservation of an on-going employer-employee relationship is more essential than is the amicable division of jurisdiction between unions whose interactions are not compelled. Furthermore, industrial peace may be maintained in some measure through unfair labor practice charges of subsection 8(b)(4)⁶¹ secondary activity against the raiding union.⁶² Third, the necessity of equitable relief differs in the two situations. An injunction is the only effective means of enforcing a

or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Although the employee's freedom from employer interference is stated *in conjunction with* his freedom of association in the preceding phrase, it would appear that the overall purpose of the statute is to enhance the employee's bargaining position as against his employer in order to obtain acceptable terms and conditions of employment. Thus, the employee's freedom is from judicial interference which impedes equality of bargaining power. *See also* Monkmeyer, *Five Years of the Norris-LaGuardia Act*, 2 Mo. L. REV. 1 (1937). The author criticizes the court of appeals' decision in *Lauf v. E. G. Shinner & Co.*, 82 F.2d 68 (7th Cir. 1936), where the employer successfully asserted that the policy statement in § 2 limited the definition of labor dispute by enunciating employee freedom from coercion by fellow employees.

61. 29 U.S.C. § 158(b)(4) (1970).

62. Section 8(b)(4) of the NLRA makes an unfair labor practice union encouragement of strikes or refusal to handle products or perform services, or union coercion of employers engaged in commerce into recognizing or bargaining with a union where another union has already been certified.

no-strike clause because damages to an employer cannot be measured accurately nor can an employer risk suing a union made up of his employees after termination of the strike.⁶³ However, nonequitable relief, *i.e.*, damages, in a suit for breach of a no-raiding agreement may be high enough to offset the raiding union's projected gains from increased membership dues even if the raid is successful, and thus may effectively deter raiding.

Because the interests which the Court sought to promote in *Boys Markets* are not present in an action to enforce a no-raiding agreement, the express prohibitions of the Norris-LaGuardia Act must be observed. Therefore, a district court lacks jurisdiction under the anti-injunction provisions of the Norris-LaGuardia Act to order the raiding union to refrain from its solicitation activities. The court necessarily also lacks jurisdiction to enforce an arbitrator's award providing the same relief.

B. *Jurisdiction to Enjoin the Board*

A court may not enjoin the Board from entertaining the raiding union's petition, from conducting an election, or from certifying the results of an election. This limitation on the court's jurisdiction derives from Section 9(d) of the NLRA,⁶⁴ which has been interpreted to limit review of Board representation determinations to review in the courts of appeals collateral to enforcement of a Board order to cease an unfair labor practice.⁶⁵ Despite this jurisdictional limitation, the court in *IBEW v. Teamsters* restrained the Board from counting the ballots cast in the contested employee unit, pending resolution of the no-raiding dispute on the merits.⁶⁶ Clearly an injunction directly limiting the Board's authority to conduct an election or nullifying election results amounts to *review* of a Board representation order and appears

63. Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 255 (1958).

64. 29 U.S.C. § 159(d) (1970).

65. A.F.L. v. NLRB, 308 U.S. 401 (1940); *Millis v. Inland Empire District Council, Lumber Workers Union*, 144 F.2d 539 (D.C. Cir. 1944), *aff'd on other grounds*, 325 U.S. 697 (1945).

66. Because Board practice is to seek permission to intervene in § 301 actions involving no-raiding agreements, the court gained jurisdiction over the Board as a party to the action. See *Cadmium & Nickel Plating, Div. of Great Lakes Indus., Inc.*, 124 N.L.R.B. 353 (1959); *Cadmium & Nickel Plating, Div. of Great Lakes Indus., Inc.*, 124 N.L.R.B. 1386 (1959).

beyond the jurisdiction of a district court, even though the validity of Board action is a collateral issue in a Section 301 action to enforce a no-raiding agreement.⁶⁷ The court in *IBEW v. Teamsters* justified its issuance of a temporary restraining order by asserting that the validity of the Board order to hold an election presented a question of law and statutory interpretation over which a district court has general jurisdiction, and that if it found the Board's order invalid under the statute, it had jurisdiction to vacate the order.⁶⁸

As noted above, Sections 9 and 10 of the NLRA limit the forum in which Board representation determinations can be reviewed. Courts also have held that Section 10 of the Administrative Procedure Act⁶⁹ does not provide the district court an independent source of jurisdiction to review Board action.⁷⁰ The courts have recognized three instances, however, in which a district court, under its general jurisdiction derived from Section 1337,⁷¹ may interfere with Board certification and orders of election: (1) Where the Board acts beyond its delegated powers and contrary to a specific prohibition in the Act, and the party has no other statutory remedy;⁷² (2) the rare situation where swift judicial intervention is necessary to prevent the Board from interfering with international relations;⁷³ and (3) where the plaintiff can make a

67. Even though the court does not necessarily examine the validity of the Board order, it is clear the same evil is present. In *United Textile Workers v. Textile Workers Union of America*, 258 F.2d 743 (7th Cir. 1958), the Seventh Circuit in enforcing the no-raiding agreement ordered the Board to acquiesce in the raiding union's withdrawal of its petition for certification. The objection that this constituted "review" of the Board election on order was not presented. The Supreme Court later cited this case with apparent approval in *Retail Clerks Int'l Ass'n, Locals 128 & 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 26 (1962). But it seems that *Lion Dry Goods* "merely signified approval of the proposition that § 301(a) provides a federal forum 'for actions on other labor contracts beside collection bargaining contracts.'" *Lodge 743, Int'l Ass'n of Machinists v. United Aircraft Corp.*, 337 F.2d 5, 9 (2d Cir. 1964).

68. 356 F. Supp. at 643.

69. 5 U.S.C. § 702 (1970). Section 10 provides for judicial review of administrative orders at the instance of "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."

70. *International Union of Operating Engineers, Local 148 v. International Union of Operating Engineers, Local 2*, 173 F.2d 557 (8th Cir. 1949); *Ohio Power Co. v. NLRB*, 164 F.2d 275 (6th Cir. 1947); *Local 542, International Union of Operating Engineers v. NLRB*, 328 F.2d 850 (3d Cir. 1964); *Connecticut Light & Power Co. v. Leedom*, 174 F. Supp. 171 (D.D.C. 1959).

71. 28 U.S.C. § 1337 (1970). This Section provides:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

72. *Leedom v. Kyne*, 358 U.S. 184 (1958).

73. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

"not transparently frivolous" assertion that the Board has infringed the plaintiff's constitutional rights.⁷⁴

The plaintiff in *IBEW v. Teamsters* obviously could not have urged jurisdiction under the second or third⁷⁵ exceptions. The court asserted, however, that the case fell within the first exception. This exception, established by *Leedom v. Kyne*, is a narrow one.⁷⁶ It does not permit a challenge in district court to the Board's erroneous assessment of particular facts,⁷⁷ to any other matters committed to the Board's discretion,⁷⁸ to its disregard of its own rules,⁷⁹ nor to an abuse

74. *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949). The incumbent union asserted it had a property right in its position as certified bargaining representative and that the Board denied the union's due process rights by refusing to grant it a hearing on the issue of whether an election order should issue. While the court asserted it had jurisdiction over the case because the union's constitutional claim was not "transparently frivolous," the court found no due process violation.

75. In no reported case has a plaintiff succeeded in claiming a constitutional violation. *See, e.g., Local 1545, United Bhd. of Carpenters v. Vincent*, 286 F.2d 127 (2d Cir. 1960) (Board's decision to withdraw contract bar protection from existing as well as future collective bargaining agreements containing hot cargo clauses did not raise a constitutional issue); *Dairy Employees Union, Local 98 v. McCulloch*, 306 F.2d 763 (D.C. Cir. 1962) (Board election order under a two year contract bar rule in the case of a three year collective bargaining agreement did not violate the union's constitutional right to due process); *Boyles Galvanizing Co. of Colo. v. Waers*, 291 F.2d 791 (10th Cir. 1961) (Board's assumption of jurisdiction over plaintiff's business contrary to its own established jurisdictional standards, if erroneous, did not deny plaintiff due process); *Amalgamated Meat Cutters of N. Am., Local 576 v. Allen*, 298 F. Supp. 985 (W.D. Mo. 1969) (Board's inadequate notice of election order to challenging union did not violate union's due process rights because union could appeal the order to the Board, the notice given was within the terms of the statute because it was "reasonable," the union in this case had no position to protect because it was merely challenging, and *Fay v. Douds* is in "disrepute"); *Greensboro Hosiery Mills, Inc. v. Johnston*, 377 F.2d 28 (4th Cir. 1967) (Board's order to hold the election held off the employer's premises did not infringe the employer's constitutional right to freedom of speech). *See also* Annot., 2 A.L.R. Fed. 376, 396 (1969).

76. *Boire v. Greyhound Corp.*, 376 U.S. 473, 480-81 (1964).

77. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *Uyeda v. Brooks*, 365 F.2d 326 (6th Cir. 1966); *Local 130, Int'l Union of Electrical Workers v. McCulloch*, 345 F.2d 90 (D.C. Cir. 1965); *Boire v. Miami Herald Publishing Co.*, 343 F.2d 17 (5th Cir. 1965), *cert. denied*, 382 U.S. 824 (1965); *Eastern Greyhound Lines v. Fusco*, 323 F.2d 477 (6th Cir. 1963); *City Cab Co. v. Roumell*, 218 F. Supp. 669 (E.D. Mich. 1963); *cf. J. Weingarten, Inc. v. Potter*, 233 F. Supp. 833 (S.D. Tex. 1964).

78. *Lawrence Typographical Union v. McCulloch*, 349 F.2d 704 (D.C. Cir. 1965) (Board's rule that employer's instigation of a decertification petition may be shown only in an unfair labor practice proceeding is within Board's discretion relating to representation matters); *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916 (D.C. Cir. 1969) (it was within Board's discretion to hold an election in absence of an actual representation question); *Leedom v. Fitch Sanitarium, Inc.*, 294 F.2d 251 (D.C. Cir. 1961) (Board had discretion under statute to decline jurisdiction over proprietary hospitals); *International Ass'n of Tool Craftsmen v. Leedom*, 276 F.2d 514 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 815 (1960) (Board's determination that multiplant bargaining unit would best promote employee freedom of choice did not constitute violation of statutory command that Board not consider extent to which

of discretion.⁸⁰ It applies only where the Board has violated an express statutory prohibition.

In *IBEW v. Teamsters*, however, the validity of the order turned on whether the Board's discrimination between the AFL-CIO no-raiding agreement and other non-AFL-CIO agreements lay within the sphere of discretion granted it by Congress in its Section 9 authorization to certify the bargaining representative of an employee unit. The Board's practice when the incumbent and petitioning unions were bound by the AFL-CIO no-raiding agreement was to withhold an election order for a limited time in order to allow the parties to arbitrate according to the adjustment mechanisms established by that agreement.⁸¹ If the parties reached agreement within the specified period, the Board acquiesced in withdrawal of the loser's petition. This practice was not followed where, as in *IBEW v. Teamsters*, the parties were bound by any other no-raiding agreement, regardless of whether it provided for arbitration. As the court conceded, this discrimination was not contrary to a specific prohibition in the statute. The court merely questioned whether the Board has exercised discretion granted it by Con-

the employees are already organized when making a unit determination); *Connecticut Light & Power Co. v. Leedom*, 174 F. Supp. 171 (D.D.C. 1959) (Board determination of employee status was within its discretion).

79. *Local 1545, United Bhd. of Carpenters v. Vincent*, 286 F.2d 127 (2d Cir. 1960). *Contra*, *J. Weingarten, Inc., v. Potter*, 233 F. Supp. 833 (S.D. Tex. 1964).

80. *Teamsters Union, Local 690 v. NLRB*, 375 F.2d 966 (9th Cir. 1967).

81. NLRB FIELD MANUAL § 11050 (1971):

Generally: Section 9(c) sets up the Board procedure for resolving representation questions on petition of parties. However, there are two programs established within the AFL-CIO for handling of representation disputes between affiliates; (1) between unions formerly affiliated with the CIO; (2) between current affiliates of the AFL-CIO.

Within certain limitations, the Board's procedures make allowance for and give weight to these programs in order to foster the spirit of voluntarism by parties to its cases and to implement section 1 of the Act with respect to encouraging practices fundamental to the friendly adjustment of industrial disputes. The Board withholds action in appropriate representation cases to give these procedures an opportunity to operate.

The 30 day time limit was cited by Intervenor. Memorandum in Support of Motion to Dismiss the Complaint at 9, *IBEW v. Teamsters*. This practice has since been amended, and as of Nov. 30, 1973, the Board policy is to follow the same procedures with respect to non-AFL-CIO raiding agreements where it appears that their operation "holds similar promise of resolving representation disputes as among the parties to such agreements." N.L.R.B. FIELD MANUAL § 11056 (1973).

gress. Its assertion of jurisdiction thus appears mistaken;⁸² only Board orders which violate express statutory prohibitions are enjoinable by the district court.⁸³

C. *Jurisdiction to Order the Raiding Union to Withdraw Its Certification Petition*

Despite no clear and specific statutory prohibition of jurisdiction where plaintiff asks that the raiding union be ordered to withdraw its certification petition, commentators have favored voluntary deference by the district courts to the Board's discretion to determine when an inter-union no-raiding agreement bars an election; they argue that representation issues concern interests other than those of the litigants themselves, and that an administrative agency, with its flexible procedures and broader view, can better evaluate the competing interests of employees, the two unions and the public in incorporating no-raiding

82. However, it should be noted that the Board practice arguably did violate the statutory prohibition of § 9(c)(2) of the NLRA, 29 U.S.C. § 159(c)(2) (1970). This Section provides:

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

By its terms this statute would prohibit the Board's discriminatory deferment policy. Legislative history indicates that the purpose of the provision was to end the practice used by the Board under the Wagner Act of "annihilating" company unions by requiring employers to disestablish them, by denying them places on election ballots, or by punishing employees who dealt with them. H.R. REP. NO. 245, 80th Cong., 1st Sess. 28 (1947); S. REP. NO. 105, 80th Cong., 1st Sess. 12-13 (1947). The only two reported decisions actually applying this provision, however, seem to suggest that its scope should not be restricted to this limited objective, although the courts upheld Board action in both instances. The court in *National Biscuit Division v. Leedom*, 265 F.2d 101 (1959), cert. denied, 359 U.S. 1011 (1959), found that the Board's schism doctrine did not violate § 9(c)(2) but rather that it was within the Board's discretion with respect to representation matters. See Thatcher, *Schism as an Exception to Contract Bar—A Protest*, 45 VA. L. REV. 238 (1959). In the second case, *Ertel Mfg. Corp. v. Little*, 52 CCH LAB. CAS., ¶ 16,569 (S.D. Ind. 1965), the plaintiff urged violation of § 9(c)(2) because the regional director had failed to apply the Board's 30% rule in deciding whether a question of representation existed. Since the rule was only a statement of policy, failure to observe it could not constitute a violation of a statutory command under the *Leedom v. Kyne* test. The court suggested that an inquiry into the director's motives in ordering an election would present a factual inquiry which the court under *Leedom* could not undertake. However, the case would not seem to preclude district court jurisdiction over a case of obvious discrimination.

83. *Leedom v. Kyne*, 358 U.S. 184 (1958).

agreements into the statutory machinery.⁸⁴ But courts should not deny enforcement of no-raiding agreements simply by a reflexive judicial deference to "agency expertise." There is a more persuasive argument for deference to the Board's election order.

The federal courts, in carrying out their Section 301 power to fashion a federal law of labor relations from the policy of the national labor statutes,⁸⁵ should assess the adverse effect which no-raiding agreements have on employees' Section 7 rights to organize and to bargain collectively through representatives of their own choosing.⁸⁶

84. See, e.g., Meltzer, *The Supreme Court, Congress and State Jurisdiction Over Labor Relations: II*, 59 COLUM. L. REV. 269, 297-301 (1959); Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529, 569 (1963); 59 COLUM. L. REV. 202 (1959); 69 YALE L.J. 299 (1959).

Others have argued, however, that the Board should also consider factors extrinsic to the labor statutes, including the judgment of the labor movement embodied in no-raiding agreements. Cox, *Some Current Problems in Labor Law: An Appraisal*, 35 L.R.R.M. 48, 58 (1954); Aaron, *Inter-union Representation Disputes and the NLRB*, 36 TEX. L. REV. 846, 861-62 (arguing for the adoption of a *Spielberg* doctrine with respect to settlements or arbitration awards under no-raiding agreements, such that the Board would recognize the arbitration award as a bar to an election if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *Spielberg Manufacturing Company*, 112 N.L.R.B. 1080, 1082 (1955)).

For a Board decision adopting the *Spielberg* doctrine with respect to an arbitration award construing the proper definition of a bargaining unit, see *Raley's Inc.*, 143 N.L.R.B. 256 (1963).

Thus far, the only published explanation for the Board's policy is its terse statement, from time to time, in its opinions that employee freedom of choice and Board superiority in representation matters cannot be limited by private contract. See, e.g., *Los Angeles Period Furniture Co.*, 43 N.L.R.B. 327, 329 (1942).

Sovern, *supra* at 569, points out that the Board could, if it wished, enforce a no-raiding agreement by dismissing the representation petition. "[W]hile it will be small consolation to . . . [plaintiff union], it lost, not because no forum was open to vindicate its rights, but because it had no rights."

85. *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

86. NLRA § 7, 29 U.S.C. § 157 (1970) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Enforcement of a no-raiding agreement can produce especially undesirable results where the employees have taken steps to have the incumbent union decertified. Under the *National Video* doctrine (*National Video Corp.*, 46 Lab. Arb. 1 (1965)), the impartial umpire who hears all disputes involving the AFL-CIO no-raiding agreement orders all AFL-CIO affiliates to refrain from organizing an employee unit which was formerly represented by another AFL-CIO affiliate, even though that affiliate has been decertified and regardless of how long it has been since the affiliate stopped representing the employees. For a discussion of the doctrine see Cole, *Review of Operation of AFL-CIO Internal Disputes Plan*, in 1969 BNA LAB. REL. YEARBOOK 407 (1970). The Board recently declined to assess the validity of the *National Video* doctrine. In *Eastpoint Seafood Company*, 208 N.L.R.B. No. 2 (1974), an AFL-CIO affiliate had

The purpose of the labor relations statutes is not simply to strengthen unions, but to strengthen unions so that employees may ultimately benefit. If in the past most raids have been successful,⁸⁷ then a majority of employees apparently believe that a change in collective bargaining representative is to their benefit. The statute and Board rules already severely limit the situations in which an individual employee may file a representation petition.⁸⁸ The harshness of union discipline⁸⁹ should the individual union member file a petition to change bargaining representative, as well as his lack of control over the parent

been decertified as the unit representative, and a second affiliate certified as the bargaining representative. The decertified affiliate then filed a grievance under the AFL-CIO no-raiding agreement, and the Umpire ordered the raider to disclaim interest in the unit. When it did so, the raiding union was charged with breaching its duty to represent the employee unit and with refusing to bargain with the employer. However, the Board held that the disclaimer, even though made under compulsion from the AFL-CIO, was valid and that it terminated the union's duties to represent and to bargain and hence its unfair labor practices.

87. The first significant no-raiding agreement was signed by 65 AFL and 29 CIO unions in 1954 before the two federations merged. A joint AFL-CIO Unity Committee had recommended the agreement after concluding from a statistical study of NLRB representation proceedings that raids between member unions of the two federations were not productive. During 1951 and 1952 there were 1245 raids between affiliates of the AFL and of the CIO involving 366,470 employees. The petitioning union was successful in gaining certification as the collective bargaining representative for approximately 62,000 employees or 17% of the total number of employees involved. A. GOLDBERG, AFL-CIO: LABOR UNITED 77 (1964).

A study by Joseph Krislov, on the other hand, finds that raids were productive, and that the Unity Committee results were incorrect. He points out that the Unity Committee study dealt with all petitions filed. However, of the 1,246 petitions studied in 1951 and 1952, 37% were closed without an election and, therefore, could not result in a successful raid. Thus, that study reported a low rate of successful raids.

Krislov studied all raids against "legitimate" unions (AFL or CIO affiliates or national independents) in selected years from 1940 through 1952. He concluded that some individual unions had indeed profited from their raiding and understandably had refused to sign the no-raiding agreement. Krislov, *Raiding Among the "Legitimate" Unions*, 8 IND. & LAB. REL. REV. 19 (1954).

Unfortunately, similar statistics on raids in recent years are not available.

88. In the interests of industrial stability § 9(c)(3) of the NLRA bars an election within 12 months of a valid prior election. And under its contract bar doctrine the Board will bar a representation election for the term of a lawful collective bargaining agreement of "reasonable duration," not exceeding three years. *General Cable Corp.*, 139 N.L.R.B. 1123 (1962), *cited in* *NLRB v. Burns Int'l Security Services*, 406 U.S. 272, 290 (1972). The Board will entertain a petition to decertify or displace the incumbent union only if it is filed not earlier than 90 days nor later than 60 days before expiration of the current collective bargaining agreement. *Leonard Wholesale Meats*, 136 N.L.R.B. 1000 (1962).

89. For example, a union lawfully may suspend or expel a union member for filing a decertification petition, *Price v. NLRB*, 373 F.2d 443 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968); *NLRB v. Molders Union, Local 125*, 442 F.2d 92 (7th Cir. 1971), but fining a member is an unfair labor practice prohibited by § 8(b)(1) of the NLRA.

organization's signing of a no-raiding agreement, should persuade courts not to erect another barrier to his access to Board election process by specifically enforcing the no-raiding agreement and directing the raiding union to withdraw its petition. This argument is equally applicable to and reinforces the previous arguments for the court's refusing jurisdiction to enjoin a raiding union's solicitation activities or to enjoin the Board from processing a certification petition.

II. APPROPRIATE RELIEF

The conclusion that a federal district court lacks jurisdiction to enjoin a raiding union's solicitation activities or to enjoin the Board from processing a certification petition, and should refrain for policy reasons from ordering the raiding union to withdraw its petition, does not require judicial abandonment of unions which seek to enforce their rights under no-raiding agreements. The courts could provide two forms of relief: (1) By *enforcing arbitration clauses* in no-raiding agreements and selectively enforcing arbitrators' awards, courts would preserve a measure of freedom of choice for employees while accommodating a second major policy of labor legislation—the peaceful resolution of disputes through arbitration.⁹⁰ The courts could continue to defer to the Board's authority by declining to enforce an arbitrator's award which blocked access to the Board's machinery or nullified its decisions, awaiting instead the Board's determination whether to recognize the arbitrator's decision as binding;⁹¹ (2) the court could *award damages for breach* of the no-raiding agreement (or enforce an arbitrator's award of damages). Such damages, if carefully assessed, would discourage "frivolous raids" since a union could afford to raid only if fairly certain of winning enough dues paying members to reimburse it for the damages award.

Finding no precedent for an award of damages for breach of a no-raiding agreement, the court in *IBEW v. Teamsters* on a subse-

90. The Supreme Court in *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964), recognized the "pervasive, curative effect" of arbitration on inter-union conflicts (even though in that case one union would not be party to the arbitration proceeding). Experience under the AFL-CIO no-raiding agreement, which prohibits affiliates' use of legal proceedings, indicates that internal union remedies are adequate. Cole, *Review of Operation of AFL-CIO Internal Disputes Plan*, in 1969 BNA LAB. REL. YEARBOOK 407, 410 (1970).

91. Meltzer, *supra* note 84, at 300.

quent motion for summary judgment denied plaintiff's claim for damages.⁹² The court stated that its decision was founded not on lack of jurisdiction, but rather on "deference to the superior authority of the National Labor Relations Board in delicate questions of collective bargaining representation."⁹³ Damages for the period between breach and the Board's involvement, while not conflicting with Board authority, would nevertheless deter a petitioner from invoking the Board's election processes, and therefore also should be denied.⁹⁴ Furthermore, even though damages calculated for the period between filing the petition and the election order would not deter filing or conflict with the Board order, such an award would encourage withdrawal of the petition and would also be impossible to measure.

The court's decision not to award damages is, of course, a policy choice. The court opted for the "superior authority" of the Board and protection of employee access to the Board's representation machinery. As suggested above,⁹⁵ reliance on *Carey v. Westinghouse* to support the assertion that the Board's authority is superior in representation matters is misplaced in the no-raiding context because the court's competence under Section 301 to determine a breach of the agreement is unique, and later Board action in no way abrogates that competence. Furthermore, several considerations suggest that damages may be appropriate even though they deter raiding. First, denial of damages essentially renders the agreement a nullity unless the Board chooses to observe an arbitration award or the parent organization disciplines the raiding local. Second, a no-raiding agreement may provide for its termination upon notice by either party.⁹⁶ Third, the employee unit may seek to avoid the appearance of a raid by first petitioning for decertification of the incumbent union and then contacting

92. 83 L.R.R.M. 2785 (1973).

93. *Id.* at 2786.

94. Defendant and the Board relied on cases holding that an NLRB award of disputed work under § 10(k) of the NLRA barred damages which were required by a prior contrary arbitration award. *Local 7-210, Oil Workers Int'l Union v. Union Tank Car Co.*, 475 F.2d 194 (7th Cir. 1973); *Dock Loaders and Unloaders, Local 854 v. W. L. Richeson & Sons, Inc.*, 280 F. Supp. 402 (E.D. La. 1968).

95. See text at notes 34-36 *supra*.

96. The IBEW-Teamsters agreement provided for its termination after six months written notice from either party. Of course, the parent organizations would be unlikely to terminate the agreement to accommodate a single local.

a competing local to represent them. While the umpire under the AFL-CIO no-raiding agreement has found this sequence to be a raid,⁹⁷ it is not clear that the language of the IBEW-Teamsters agreement should be similarly construed because it prohibits raids only where an “established collective bargaining relationship” exists, *i.e.*, where the employer has recognized the union or the Board has certified it as representative. Thus, the decertification procedure may provide an escape mechanism from the situation where the incumbent union clearly has failed to represent the employees’ interests. Finally, refusal to award damages denies any value no-raiding agreements have to preserve industrial peace. While a balancing of employee freedom of choice and industrial peace will vary with each situation, the court should not deny damages in every case without weighing these factors.

What measure of damages would deter an unsuccessful raid? Whether it wins or loses the election, the incumbent union should be able to claim its reasonable election campaign costs. Permitting full costs would allow the incumbent too much control over the terms of the raid, and permitting recovery of dues for any period would penalize the successful raid as well as the unsuccessful.

97. National Video Corp., 46 Lab. Arb. 1 (1965).

III. CONCLUSION

Parties to no-raiding agreements should anticipate that even though Section 301 of the Taft-Hartley Act grants federal district courts jurisdiction over suits to enforce inter-union contracts, that jurisdiction is limited by the anti-injunction provisions of the Norris-LaGuardia Act which prohibit a district court from enjoining a raiding union's solicitation activities, and by the review provisions of the NLRA, which prohibit the district court's assertion of jurisdiction to "review" Board representation orders and thus prevent the court in a Section 301 action from enjoining the Board's action on the raiding union's petition. Courts, in order to preserve employees' freedom to choose collective bargaining representatives, may also refuse as a matter of discretion to order the petitioning union to withdraw its petition from the Board, and, though the court could order arbitration if the agreement so provided, not all aspects of the award would be specifically enforceable. Thus, the parties will be forced to rely on damages (which may prove not to be fully compensatory) and internal union discipline to prevent locals from raiding.

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